

**U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE**

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE GARY R. BROWN
UNITED STATES DISTRICT JUDGE

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Appearances (Cont'd)

For the Defendant,
Town of Oyster Bay:

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1 (Proceedings commenced at 10:03 a.m.)

2 THE CLERK: Calling case Civil 2016-5760, Romano vs.
3 Northrop Grumman Corporation, et al.

4 Counsel, please state your appearance for the
5 record. Plaintiff goes first.

6 MR. NAPOLI: Sure. Paul Napoli, from Napoli
7 Shkolnik, on behalf of the Romano, Ackerman, Akerson, Ball,
8 Cammarata and Cornett plaintiffs.

9 MR. ESPOSITO: Good morning, Your Honor.
10 Sorry, did I step on someone?

11 THE COURT: Nope. Go ahead.

12 MS. FACTOR: This is Lilia Factor. I'm just
13 listening in also for plaintiffs.

14 MR. ESPOSITO: Good morning, Lilia. Good morning,
15 Your Honor. Good morning, everyone.

16 This is Grant Esposito from, Morrison & Foerster, on
17 behalf of Northrop Grumman. On the call today are my
18 colleagues that will be listening in. Katie Viggiani, from
19 Morrison & Foerster, and Mark Miller, from the Hollingsworth
20 firm.

21 THE COURT: All right. Is that everyone then?

22 MR. SEIDEN: And Pete -- sorry, Your Honor. I
23 didn't mean to step on you.

24 THE COURT: No. Go ahead.

25 MR. SEIDEN: Peter Seiden, from Milber Makris, for

1 the Town of Oyster Bay.

2 THE COURT: Right. Welcome back. Anyone else?

3 MR. SEIDEN: Thank you, Your Honor.

4 THE COURT: All right. Not hearing any responses, I
5 guess we should proceed.

6 I believe last time we were together we -- I thought
7 it was a good idea we should do this by video and somehow it
8 just didn't get scheduled that way -- and I apologize for that
9 -- but we will move forward with what we have.

10 I will note for the record we are continuing to
11 waver under the very difficult pandemic conditions that
12 confronts litigators and for that matter humans everywhere.
13 So with that in mind, we are on an audio conference, but we
14 will get through the issues that present themselves.

15 I have reviewed the joint letter submitted in the
16 last few days by the parties concerning the sort of update as
17 to where we are. And let me start with plaintiffs on that,
18 please.

19 And, counsel, let me ask you this. Is it fair to
20 say that since we last spoke, and we last spoke in July I
21 believe, you've received a substantial amount of information
22 from the defendants since then. Yes?

23 MR. NAPOLI: I would say we received some
24 information. I think it's all relative, Your Honor, to the
25 amount of information that we're seeking and the type of

1 information that we're seeking in order to be able to prove up
2 our case.

3 THE COURT: Okay.

4 MR. NAPOLI: But, we did receive some documents,
5 yes.

6 THE COURT: All right. So now I was thinking about
7 that. And perhaps in reviewing the transcript from July, I
8 recognize that perhaps the discussion wasn't as focused as it
9 could have been, because, you know, we talked about getting
10 everybody the information they need. This is me talking, so
11 this is my fault, right, but I guess I didn't actually specify
12 need for what.

13 So I guess the question is when you say prove up
14 your case -- that's interesting -- and there's a lot of
15 language in your letter about they're withholding this and
16 only news dates found this and then so forth.

17 MR. NAPOLI: Sure.

18 THE COURT: But the real question I guess for
19 today's purposes is you need to gather information to prepare
20 you to move for class action, isn't that -- class action
21 certification. Isn't that really the next step?

22 MR. NAPOLI: Yes, Your Honor. Correct.

23 THE COURT: Okay. So if we focus the inquiry that
24 way and say we're looking to tee up a motion for class action
25 certification -- because as I thought about it, and I didn't

1 make this distinction last time, that there are individual
2 plaintiffs and that's a sort of different question, right --
3 but in terms of class action certification, what information
4 or categories of information remain that you need to get that
5 you don't have so that you're in a position to move for a
6 class action?

7 MR. NAPOLI: So when you talk about class action
8 issues under Rule 23, I believe there is some aspect of
9 liability associated with it. And also in a toxic tort case,
10 exposure and the extent of exposures. Since the class that
11 we're seeking to certify is for medical monitoring, we need to
12 put together the parameters of exposure.

13 And as we talk with our experts, we understand that
14 there are multiple routes of exposure emanating from this
15 Grumman site over the years and for different periods of time
16 that they changed.

17 So those areas of exposure are both dermal and oral
18 from drinking water exposure, but also potential soil
19 exposure. There were letters and things of children playing
20 in the backyard and not to play in the backyard or to garden
21 in the backyard at various times. There's air exposure not
22 only in home but in the community.

23 And so in order to substantiate those routes of
24 exposure, we need to simply know volume of use of the
25 contaminants. You know, so how much they purchased, how they

1 used it and how they disposed of it.

2 So that would include onsite, groundwater
3 remediation, modeling and testing. So they have monitoring
4 wells on each site that they would test on a consistent basis
5 for volumes of contaminants, offsite monitoring. But also I
6 would need to understand what they actually used in practice
7 because the monitoring wells only talk about one point in
8 time.

9 In order for experts to consolidate exposure on
10 groundwater, they'd have to know that they've used a thousand
11 tons of TCE and maybe moved off site a hundred tons of TCE, so
12 we know that 900 remain in the ground.

13 THE COURT: Okay.

14 MR. NAPOLI: At the same time, they had stacks at
15 this site that also emanated two known products, hexavalent
16 chromium and TCE.

17 So we need to understand their processes of what
18 they did at the facility that generated air emissions, and so
19 that our experts can then extrapolate the exposure over time
20 to various people in the community.

21 These are all documents and items that were not
22 necessarily disclosed to government officials over the years.
23 And we know from representatives at the state, federal and
24 local levels that they haven't been provided or haven't been
25 given that we need to know.

1 So that's what we would need as a basis. And once
2 we have that information, we can then give it to our experts
3 because this will be a very expertintensive certification.

4 We could give it to our experts so that they can
5 give us the calculations to tell us over what period of times
6 were the greatest exposure, who was exposed, how long that
7 exposure matters for various parts of the community. That's
8 how the case is essentially put together.

9 We've been -- we've met and conferred with the
10 defendants a number of times. It's not that we have not been
11 doing anything. We've tried to come to some agreement with
12 them.

13 And we have come to agreement on some issues, but as
14 you saw from the joint letter, it was contingent on us
15 providing information on an individual basis of cases, and we
16 just didn't think one should be contingent on the other.

17 THE COURT: Okay. I mean, I can deal with the
18 contingency thing which, I mean, irrespective of whether
19 making it contingent, if you have the individual information,
20 why shouldn't you be required to provide it?

21 MR. NAPOLI: Oh, if that's a question, Your Honor?

22 If we're litigating the class case and putting the
23 individual cases on hold, then I don't think -- I think it's a
24 distraction. If we're going to be focusing our efforts on the
25 initial limited issues then, like I said, I think it's just a

1 distraction.

2 You know, we're not doing discovery of the
3 individual cases -- IF we're doing discovery of individual
4 cases, you know, we will provide the authorizations and answer
5 interrogatories and do those depositions. We have no problem
6 with that.

7 But we've been going under the assumption that we're
8 just handling the class. We would like to do all the cases at
9 once, but we're under the assumption we were doing the class.

10 THE COURT: But doesn't the -- what I don't
11 understand is, don't the existence of the individual
12 plaintiffs in some senses inform the class? In other words,
13 if you have individual plaintiff 17 -- I'm making up numbers,
14 I don't even know how many there are, I haven't counted this
15 morning, but who has, you know, malady A and was exposed to
16 chemical B, isn't that part of what's informing your efforts
17 to create a class?

18 MR. NAPOLI: Well, I think I would answer it this
19 way, Your Honor.

20 I think all -- I would think all the information
21 that we can gather is helpful, but they are -- individual
22 places have different burdens than the class. The class is
23 primarily for medical monitoring, which are people who have
24 some, and we've talked about this case in previous
25 conferences, the New York Court of Appeals case that deals

1 with it, that have some injury but not the injuries that we're
2 most concerned about, some of these cancers. The individuals
3 have -- the ones that we filed have cancers. So there are
4 different issues.

5 THE COURT: Right. I understand. Okay. All right.
6 Let me back up a little bit into what you said and ask this
7 question. You said something about when you're looking at the
8 routes of exposure of the contaminants, are we agreed --

9 MR. NAPOLI: Yes.

10 THE COURT: -- is there a list as to what the
11 contaminants are?

12 MR. NAPOLI: Yes. There are known contaminants, and
13 we've given a list as part of our search terms to the
14 defendants. And I can -- I mean, I can tell you some of them
15 from memory. Some of them are long chemical names that I
16 can't even pronounce.

17 THE COURT: Don't bother. I just want to -- I'm
18 more interested in numbers.

19 MR. NAPOLI: Sure.

20 THE COURT: How many are there?

21 MR. NAPOLI: So there's probably about a dozen. But
22 I do say this, Your Honor. You know, before 2014 nobody knew
23 in the world of at least plaintiffs' mass tort litigation
24 about the word PFOS or 1,4-Dioxane. And to this day most
25 state regulators around the country don't. New York is an

1 exception and it does. It's recently passed laws on it.

2 You know, there are -- what we'd like to know is
3 what chemicals they've used in their process. As of now we
4 know TCE was used, but we also know that 1,4-Dioxane, which
5 was not known or was not regulated until this year, was used
6 with TCE. We have no idea how much 1,4-Dioxane Grumman used.
7 So there are potentials for contaminants we know nothing
8 about.

9 You know, we would like to know about their
10 processes, and we'll get into it, but what we believe are the
11 primary are TCE, hexavalent chromium, PFOS, which is there's a
12 number of perfluorinated surfactant. We're not sure which
13 ones they used PFOA, PFOS, PFMNA, and then 1,4-Dioxane. Those
14 are the four primary that we know about now that they used in
15 mass quantities, that had exposure, and that emanated from
16 this site.

17 But we don't want to preclude that there aren't any
18 others because, you know, there are 80,000 chemicals that are
19 in use by companies like Grumman that have no regulation and
20 nobody knows much about, if anything, of their use.

21 THE COURT: Right. Okay. So there's the
22 interesting thing. And I was waiting if you were going to get
23 to that point.

24 Because last time we were together, one of your
25 colleagues who may not be a colleague anymore -- I'm not sure

1 if he's still on the case -- but indicated there were 85,000
2 chemicals. And I said, well, that's ridiculous. You can't
3 expect responses on 85,000 chemicals because, you know, again,
4 they used Windex to clean the windows and that's not what this
5 case is about, right?

6 MR. NAPOLI: Sure.

7 THE COURT: So there's got to be a way of focusing.

8 When you say unknown, if you're saying to me you
9 don't know whether or not Grumman used chemical X, which is a
10 known carcinogen in significant quantities or not, that's
11 interesting to me, right.

12 If you say to me, these chemicals, we don't know if
13 they're harmful yet or not, well, we have litigation here,
14 right. We can't possibly anticipate everything in the future.

15 And I think of course there's statute of limitations
16 that, you know, protect you from things that are discovery,
17 right. TCE is a good example. TCE was declared a carcinogen
18 in 2016 I think it was if I remember correctly. I think
19 that's right. And when it's declared a carcinogen, there's a
20 list. There's some federal agency that has a list, you know.

21 So which one are you talking about? Are you talking
22 about things we don't know what they do yet or we don't know
23 if Grumman used them in significant quantities?

24 MR. NAPOLI: Yeah. We don't know if Grumman used
25 them in significant quantities. And so most of what they've

1 provided us, Your Honor, are, you know, government reports
2 that are available to the public, not necessarily in a usable
3 fashion.

4 We have no real internal processes or internal
5 information. Some of this information they've given in other
6 litigations but they haven't given to us. They've been very
7 restrictive in what they're providing us in time and even with
8 the custodians. So we just simply need this information.

9 They said, well, it's a lot. It's two million
10 pages. It's already been vetted for work product in the prior
11 litigation. Give it to us. Two million pages does not scare
12 us. You know, we'll have to go through it and do our job.

13 THE COURT: Okay. All right. I think I have an
14 idea here.

15 Let me switch to defendants' counsel, please. Who's
16 speaking again today?

17 MR. ESPOSITO: Good morning, Your Honor. Grant
18 Esposito from Mofo.

19 THE COURT: Mr. Esposito, hold on one more moment
20 before we go forward.

21 Back to plaintiffs' counsel for a second.

22 MR. ESPOSITO: Sure.

23 THE COURT: The last time we were together we spoke
24 a great deal about getting information from third parties,
25 water districts and, you know, the government in the town and

1 so forth. Have you gotten more information from those sources
2 as well?

3 MR. NAPOLI: We have gotten some additional
4 information. And as an exhibit to our joint letter, we've put
5 on exactly where we are.

6 And I'll just look -- it's exhibit 1 to the joint
7 letter -- exactly where we are. I've been in contact with DOJ
8 in Washington and talked to them about many of the *Touhy*
9 letters, talking to the highest people at the Civilian Tort --
10 Civil Tort Division that I've been working with on other
11 cases.

12 And we also represent Nassau county in the opioid
13 litigation, so we've been talking to their county attorney.
14 And they've all consistently told us a few things.

15 One, that the pandemic has made it exceedingly
16 difficult to respond to this information. Some of it is
17 archived in either federal records offices, archives that are
18 closed or on part-time operation.

19 Some of the information needs to be vetted by Navy
20 and other high levels that have top security clearances before
21 they vet it because that's a matter of course. So it is going
22 to take some time.

23 Our experience in other litigations is it's taken
24 eight months to get some information and it may take longer.
25 So it's not the panacea for everything in discovery.

1 And as, you know, we indicate in our joint letter
2 and we've been told by various government officials, you know,
3 a lot of the information that we're looking for was never
4 given to the government. And that's part of the problem.

5 THE COURT: Okay. All right. Let me go back to Mr.
6 Esposito.

7 Mr. Esposito, sorry to interrupt like that. I just
8 wanted to close out that one issue.

9 All right. Mr. Esposito, where are we from your
10 perspective?

11 MR. ESPOSITO: Sure. Thank you, Your Honor. So a
12 couple of things.

13 First off, the statement that was made about the
14 restrictions on what we've been producing is not fulsome. So
15 let's start with the procedural posture, right.

16 As you correctly pointed out, the case has been
17 bifurcated. We're in class discovery. Representations were
18 made to Judge Lindsay, who was handling class discovery, that
19 the paper discovery was basically done and we were getting
20 ready to do depositions of putative class reps.

21 As we state in the letter, and as we stated back in
22 our request for a *Lone Pine* order back in March of last year,
23 information came to light during class discovery which
24 suggests, in fact, we say demonstrates, that the plaintiffs
25 cannot satisfy their obligations as part of a class action or

1 really from any of their cases to show exposure or causation.
2 And so we've asked this court to focus the remaining part of
3 class discovery on the issues of exposure and causation.

4 Much of what the plaintiffs are seeking -- and they
5 say things that were done onsite -- that issue was litigated
6 before Judge Lindsay back in March of 2019, even earlier.

7 And, in fact, if you look at plaintiffs' response in
8 March of 2019 to our *Lone Pine* request, they concede that
9 documents related to contamination at the site are not part of
10 class discovery. And that makes perfect sense and Judge
11 Lindsay was right.

12 So the issue is not what was used on the site, not
13 where there was contamination on the site, but whether or not
14 away from the site, down gradient where the plaintiffs are, if
15 there are contaminants. So that's what we're trying to focus
16 on.

17 And I really appreciate you asking the question
18 about what are the contaminants we're talking about. Because
19 as we said in the letter the list of search terms plaintiffs
20 provided includes contaminants that are not alleged in the
21 complaints and have not been found by the New York State
22 Department of Environmental Conservation to be contaminants
23 that are related to the site.

24 So in one of the exhibits, Your Honor, there's a
25 list. It's from the amended AROD, A-R-O-D. It is a

1 culmination of 30 years of investigation into the legacy Navy
2 Grumman site and it lists a number of chemicals of concern,
3 not all of them cause health issues, right, but those are the
4 ones they thought were important enough to remediate. And
5 before this call, I did not hear that the ones that we're
6 talking about are PFOS, hex chrome, 1,4-D and TCE.

7 A word on PFOS, Your Honor. You know, when we got
8 together back in July, Mr. Napoli was asked in response to
9 your questions about PFOS in the *Benoit* case, as you may
10 recall, and he said that chemical is not part of this
11 litigation. That's at page 5 to 7 of the transcript back in
12 July.

13 But with regard to TCE and hex chrome and 1,4-D, not
14 only have we produced information about, you know, where those
15 chemicals may or may not be in the community, but they know
16 those chemicals.

17 So the question is what else do they need to know?
18 What other chemicals do they -- are they concerned about that
19 they think may have caused injuries or even had plaintiffs
20 exposed to them? Tell us those.

21 We've been more than willing to, you know, run some
22 searches and look for information that they don't already
23 have. You know, this site has been studied extensively. The
24 nature and the number of the contaminants have gone into the
25 community are known and documented.

1 And so where we're at, Your Honor, is that what the
2 plaintiffs are trying to do is notwithstanding the fact that
3 we are in class discovery, notwithstanding that Judge Lindsay
4 has already defined the bounds of class discovery, is to seek,
5 you know, full-merit discovery into every chemical that was
6 ever used, however it was used on the site, and not focusing
7 on what are the contaminants that are in the groundwater.
8 Nobody disputes those.

9 What are the contaminants that their experts are
10 saying could have caused the types of injuries alleged, and
11 where is the evidence that anybody was exposed to them?

12 Because as we've pointed out in our letters and
13 previously, the regulators have said repeatedly that exposure
14 alleged in this case did not happen -- New York regulated four
15 years.

16 And does anyone really think that if New York's
17 regulators perceived a risk to human health they would not
18 have acted on it? That's the premise of this lawsuit, Your
19 Honor.

20 And that's why we're asking the Court to focus
21 discovery consistent with *Lone Pine* on the issues of exposure
22 and causation. And if the plaintiffs need more on exposure
23 and causation in order to come forward with their expert
24 reports on those issues, we remain willing to produce them.

25 THE COURT: Okay. So, Mr. Esposito, what I'm having

1 trouble with, and I may be in an unusual position having just
2 served as a magistrate judge for close to a decade on this
3 court and now being the district judge, but when I was reading
4 the joint letter last night, I was thinking this just sounds
5 like a discovery dispute.

6 You're saying it's overly broad and burdensome. And
7 they're saying, no, it's necessary. And I'm thinking I'm
8 having a cart before the horse problem with the *Lone Pine*
9 concept. That's a management -- that's a management tool,
10 right, how we manage a case. And if it's not being helpful in
11 managing the case, then why are we going through this
12 exercise?

13 In other words, I don't know what tools that *Lone*
14 *Pine* is adding to our toolbox that we don't already have in
15 the form of a very unbelievably talented magistrate judge
16 who's, you know, evaluating things and deciding on the
17 proportionality questions. Why do I need to talk about *Lone*
18 *Pine* at all?

19 MR. ESPOSITO: Sure, Your Honor. And let's be
20 clear, if Your Honor decides that we shouldn't be (inaudible)
21 those processes for the reasons that we talked about
22 (inaudible) a lot of issues because then we can just move
23 right to depositions of the plaintiffs' reps. Because what
24 the plaintiffs are asking for, Your Honor, they've already
25 asked Judge Lindsay for. We've already litigated those

1 issues.

2 But here's why we think a *Lone* (inaudible), right.
3 The allegations are that plaintiffs were affected (inaudible)
4 contaminated ground (inaudible) below the ground either
5 because it came through the tap or because there was soil
6 vapor intrusion, that the TCE and other chemicals kind of
7 wafted up under the feet into their backyards and their soils.
8 Or it's because they visited Bethpage Community Park.

9 If this site had never been studied before and this
10 was a brand new case and there had been no evidence or no
11 science looking into this, I don't -- we wouldn't be asking
12 for a *Lone Pine* process.

13 But the (inaudible) for decades. And the
14 regulators, as recently as December of 2019, in response to
15 public comments, including comments that were posed by
16 plaintiffs' counsel, said none of those exposure pathways are
17 viable. Well, if the pathways are viable, right, we can all
18 agree on this. If a plaintiff was not exposed to a
19 contaminant, then a plaintiff doesn't have a claim.

20 So because of what we learned during class
21 discovery, and because of the test results the plaintiffs
22 themselves did on their properties which show that the four or
23 five chemicals Mr. Napoli just mentioned are not on the sites,
24 not on their properties, we think a *Lone Pine* (inaudible)
25 administration of this litigation.

1 Because we're either facing a class action of
2 (inaudible) of everybody in Bethpage and a couple of hundred
3 individual cases, or we're going to get our hands around what
4 can actually be litigated and focus on what might be no more
5 than a handful of folks who have plausible claims of exposure
6 given what the regulators have already said.

7 And so in the face of all that existing science and
8 investigation, we think the most efficient path forward is for
9 the plaintiffs to come forward and say this is how the
10 plaintiffs claim (inaudible) and they were exposed to such a
11 degree --

12 THE COURT: Mr. Esposito --

13 MR. ESPOSITO: -- that the injuries are plausible.

14 THE COURT: -- let me just interrupt you for one
15 second.

16 MR. ESPOSITO: Sure.

17 THE COURT: I'm sorry. You're just breaking up a
18 little bit. I don't know if you're in a bad spot or if you
19 can move a little bit, but I'm just -- I'm losing a few
20 syllables here and there.

21 MR. ESPOSITO: Okay. Let me try this. Is this
22 better, Your Honor?

23 THE COURT: Oh, much better. Thank you. Thank you,
24 Mr. Esposito.

25 MR. ESPOSITO: Okay.

1 THE COURT: Okay. Go ahead. Sorry. Continue
2 please.

3 MR. ESPOSITO: Sorry about the (inaudible). Okay.

4 So just to recap to make sure that everything was
5 heard, the reason we had moved for a *Lone Pine* type process is
6 to focus on the threshold question of whether or not any of
7 these plaintiffs were actually exposed to (inaudible).
8 Because we can all agree, if they were not, there are no
9 claims.

10 So to get our hands around what can actually be
11 litigated, in order to have an efficient administration of
12 this litigation, what we need to know is are we really facing
13 a class action of everybody in Bethpage and a couple of
14 hundred individual plaintiffs?

15 Or are we really talking about at most a handful of
16 cases where there may have been (inaudible) in Bethpage back
17 in the '50s and '60s when nothing was known about these
18 chemicals and (inaudible) no regulations in place like they
19 are now? And we have arguments about that and whether or not
20 there could be negligence in that time period, but that's for
21 another day.

22 Let's see which claims (inaudible)? We've been at
23 this for four years. The theories about the sources of
24 exposure and the pathways for exposure keep moving, but
25 they've been studied, Your Honor.

1 And so what we respectfully request and continue to
2 request is let's focus on what the plaintiffs have to show
3 (inaudible) these plaintiffs were actually in contact with or
4 exposed to the key chemicals at issue --

5 THE COURT: Right. My question to you is this.

6 MR. ESPOSITO: -- and what these chemicals are.

7 THE COURT: Why isn't -- at this point, because, you
8 know, part of your arguments on *Lone Pine* to me just sounds
9 like you're either arguing summary judgment or arguing class
10 action up front, right.

11 So before we give them anything, we're entitled to
12 this or we shouldn't have to be sued by this group of people,
13 and that's problematic because I think the answer is, you
14 know, before the New Jersey Superior Court decided *Lone Pine*,
15 we here in the federal court, we had a pretty good system for
16 getting through discovery, getting cases teed up for class
17 action, getting cases teed up for summary judgment and for
18 trial. I mean, we have, you know, moved. They talk about
19 proportionality, about undue burden, fairness, balance. I
20 mean, we have those processes.

21 So when you said a few moments ago, you know, Judge,
22 they're putting chemicals on these lists that include search
23 terms that are just outside the scope of anything that, you
24 know, came up before, well, what I would have done if I were
25 the magistrate judge on the case, at that moment when you said

1 that to me, I'd say what's your added cost to add two more
2 search terms? If nothing comes up, nothing comes up. If a
3 few documents, you turn them over. What's the big deal?

4 So I'm having trouble understanding what's the
5 prejudice to your client. And conversely, am I really in a
6 position to say, well, the state DEC studied this problem,
7 therefore, the plaintiffs are entitled to no other information
8 from your client because that's done. Do you see the point
9 I'm making, Mr. Esposito?

10 MR. ESPOSITO: Yeah. We're not disagreeing. We've
11 produced 240,000 pages of information talking about where the
12 contaminants are, (inaudible) are, the composition of them in
13 plumes. We've never (inaudible) search terms for chemicals
14 that the plaintiffs have either alleged or that there's some
15 reason to believe are in the plumes. We're not -- there's no
16 (inaudible). What we're trying to figure out --

17 THE COURT: A few minutes ago, Counsel --

18 MR. ESPOSITO: -- (indiscernible) --

19 THE COURT: Hang on one second, Mr. Esposito. A
20 quick question.

21 MR. ESPOSITO: Sure.

22 THE COURT: You said 240,000 pages. Interesting,
23 right. A few minutes ago counsel said that he requested
24 something from you -- and again I don't -- you all work this
25 case every day, I don't, right, but I try to understand

1 everything. He said two million pages you said you had that
2 you're not going to give him because it's two million pages.
3 What are we talking about? What's the corpus of information
4 there --

5 MR. ESPOSITO: Sure.

6 THE COURT: -- and what's the problem with turning
7 it over?

8 MR. ESPOSITO: Sure. So what was said is not true.
9 That's the problem, Your Honor. Here are the facts.

10 THE COURT: Oh.

11 MR. ESPOSITO: As we were meeting and conferring and
12 trying to come up with a process for moving the case forward,
13 as Your Honor directed, they said, well, look, you have
14 documents you've produced in other cases. And he specifically
15 mentioned three cases; one involving the Town of Oyster Bay,
16 one involving the Town of Hempstead, and one involving the
17 Bethpage Water District. And we said the documents are beyond
18 the issues of exposure and causation about which we are
19 supposed to be focused, but we will produce those. We will
20 produce those.

21 THE COURT: Okay.

22 MR. ESPOSITO: Now, again, I have to check and see.
23 There may be third parties, there may be some confidentiality
24 issues, but those are not insurmountable obstacles.

25 MR. NAPOLI: Your Honor.

1 MR. ESPOSITO: And we said (inaudible).

2 MR. NAPOLI: I'm sorry.

3 MR. ESPOSITO: Yeah. That's okay.

4 THE COURT: Hang on. I'll come back to you counsel.
5 Please.

6 Go ahead. Go ahead.

7 MR. ESPOSITO: Yeah. Yeah. So what we said was we
8 would produce them. Maybe it's (inaudible) last offer, right,
9 because we went beyond that. You have 150 search terms.
10 These are way overbroad. As you know we're not associated
11 with the site or with any of the alleged injuries.

12 But more importantly, and to talk about the
13 significance of (inaudible), Your Honor, 85 percent of those
14 search terms hit on the documents Northrop Grumman had already
15 produced.

16 So what we said was, tell you what (inaudible)
17 search terms that didn't hit on those, right, we'll run across
18 the four custodians that the parties were actually able to
19 agree upon.

20 We have offered to do that. We are prepared to do
21 that. And all we asked for in exchange, Your Honor, was
22 whatever the information the plaintiffs have about exposure
23 and causation that they're going to have to give their experts
24 anyway that they hadn't given to us already and they refused
25 to do it. So there is a deal there that resolves all this.

1 MR. NAPOLI: So, Your Honor, if I may just --

2 THE COURT: Yeah.

3 MR. NAPOLI: -- just address, you know, when counsel
4 says I'm not telling the truth. As I said, we had meet and
5 confers. And as a result of one of those meet and confers,
6 Mr. Esposito's associate, or partner, Katie Viggiani, sent us
7 a follow-up letter on September 23rd, 2020 and she addressed
8 three categories of documents.

9 The first documents -- category of documents was
10 associate with the custodians that we had requested search
11 terms be run for.

12 And on page two of her letter, she addresses that
13 those hits, those number of hits were run for all proposed
14 terms across the three custodians, and it would result in a
15 yield of more than 215,000 documents, 1.5 million pages.

16 So that was the first request for documents we asked
17 them to give us which they haven't because they wanted to give
18 us individual information on each individual.

19 The second was what Mr. Esposito just indicated,
20 which is also in the letter on page 4, which talks about an
21 additional 225,000 documents, or two million pages, in the
22 related litigations involving the Grumman site in Bethpage,
23 which they also conditioned on providing us, which we refused.

24 The third category that Mr. Esposito just raised,
25 that he was willing to run the search terms against documents

1 except the search terms that had already had hits, and that's
2 on page 3 of his letter. And just so you understand what that
3 means, because we had several conversations as to what that
4 means, and my understanding from those conversations is that
5 they originally ran documents-- looked for documents from 1987
6 to 2016.

7 That was all that they provided regardless of the
8 fact that PFOS and 1,4-Dioxane were just known to the
9 government, state and federal in 2018-19, and regardless of
10 the fact that the chimney-spewing hexavalent chromium were
11 from '52 into the '80s, okay.

12 So what they did is they said we're looking at that
13 period of time and these search terms out of your 150. I
14 think it was like 140 of them had some hit in that period of
15 time. So we're not going to run those against all time, ever
16 again. We're just going to run the ten or 12 remaining search
17 terms against everything. And to us that was just
18 unacceptable.

19 We wanted all the search terms run against all the
20 time. Obviously, we didn't want the same documents again, but
21 these three categories of documents, one of which they have in
22 their files, they just have to put it to disk or put it in a
23 Hightail link and we'll have them.

24 The other one, they've done the search. They
25 probably have to cut it to a disk and send it to us. And the

1 third category, they could run the category, and we're done.

2 But everything was conditioned on Mr. Napoli and Ms.
3 Factor going to each individual client and coming up with an
4 Excel chart and giving them an Excel chart. And only if we
5 gave them the Excel chart would they give us these. And that
6 was the problem. We'll take those offers from Mr. Esposito,
7 but we just don't think it's appropriate to link the two
8 together.

9 THE COURT: Okay. You know --

10 MR. ESPOSITO: But, Your Honor --

11 THE COURT: Hold on. No. No. No. Mr. Esposito,
12 hold on.

13 Let me just stay with plaintiffs' counsel for a
14 minute --

15 MR. ESPOSITO: I'm sorry.

16 THE COURT: -- because I don't get this. Because
17 here's the thing. It is inappropriate for everyone to be
18 withholding everything? I don't understand. In other words,
19 what's the harm in turning over the individual plaintiff
20 information that you have?

21 MR. NAPOLI: There is no harm, Your Honor, if we're
22 going to do --

23 THE COURT: Well, then we should just do it.

24 MR. NAPOLI: You ordered me to just --

25 THE COURT: Let's just --

1 MR. NAPOLI: Yes.

2 THE COURT: Okay. Good.

3 MR. NAPOLI: I'm sorry.

4 THE COURT: So let me make this clear.

5 MR. NAPOLI: I don't mean to interrupt you. I just
6 wanted --

7 THE COURT: It's all right. It's all right.

8 MR. NAPOLI: I just wanted to make it clear.

9 THE COURT: No one's saying to me that exceptional
10 economic burdens, you know, or that there's privileges. I'm
11 not hearing any of that. You know. And also, frankly, I'd
12 rather leave this to Judge Lindsay who has much more of a
13 handle on it, but I'm going to say everything I just heard
14 about should get turned over.

15 So if we just do that, then the question I have for
16 plaintiffs' counsel is then let's go revisit my question about
17 how long do you need if we're going to be ready to file the
18 class action certification motion?

19 MR. NAPOLI: So, Your Honor, I would say assuming
20 that we have everything and are able to do depositions, I
21 would say September.

22 THE COURT: Okay. Let me go back to counsel for
23 Grumman. What do you think? Mr. Esposito, what do you think?

24 MR. ESPOSITO: So --

25 THE COURT: I order everybody to turn everything

1 over. I send this back to Judge Lindsay to resolve any sort
2 of, you know, more specific disputes. And we set a September
3 date to start briefing the class action motion.

4 MR. ESPOSITO: Yeah. Okay. So, unfortunately, when
5 I broke up before, you broke up a little bit before, could
6 you --

7 THE COURT: Oh, I'm sorry.

8 MR. ESPOSITO: -- did you say -- I think what you
9 said was we're going to have a conference with Judge Lindsay
10 to define the scope of whatever discovery is remaining and
11 then start (indiscernible) in September?

12 THE COURT: No, that's not what I said at all, Mr.
13 Esposito.

14 MR. ESPOSITO: Sorry.

15 THE COURT: No. No. No. No. I said turn over
16 everything we just identified. I don't know why you're
17 withholding millions of pages of documents that you've
18 identified that you'll only give them if they turn over
19 individual -- we're not going to play it that way. He's going
20 to give you the individual plaintiffs stuff.

21 MR. ESPOSITO: Sure.

22 THE COURT: You're going to give him everything you
23 have, right? And that will set us in the right direction,
24 hopefully, to get class action -- the class action motion
25 briefed you see.

1 I will also look forward to Magistrate Lindsay for
2 any additional disputes that you will have, but that's not
3 like a lot of data to me.

4 MR. ESPOSITO: Sure. So again --

5 THE COURT: So if you turn all that information over
6 -- go ahead -- and then --

7 MR. ESPOSITO: Yeah. So --

8 THE COURT: -- we're aiming for like a September
9 date to do class action, the class action motion.

10 MR. ESPOSITO: We're fine. I just want to be clear
11 that what we're talking about is -- so the Court is basically
12 ordering the parties to do the deal that's in the
13 correspondence (inaudible) --

14 THE COURT: Hold on. Hold on. Hold on. Counsel.

15 MR. ESPOSITO: Because you say everything, and I
16 just don't know what that means.

17 THE COURT: Well, look, I just heard -- and, again,
18 I so don't want to do this at this level of granularity -- but
19 I just heard about 214,000 pages and two million pages and all
20 the individual plaintiffs added that you're demanding that's
21 not being turned over. It is what it is. Everyone has this
22 information. I don't know why you didn't turn it over before.
23 But I'm just saying turn all that stuff over. It should give
24 us a good start -- that's not finished -- to get what we need
25 to get for class action depositions and then do the class

1 action motion, right?

2 So, you know, again, I don't know that that's the
3 limits of what's going on, but anything -- any other
4 individual disputes you can bring back to Judge Lindsay who
5 can analyze it using the traditional tools that we use here in
6 federal court to resolve discovery disputes. Is it
7 burdensome? Is it privileged?

8 MR. ESPOSITO: Exactly.

9 THE COURT: Is it -- there's a cost. Is it
10 proportional? All those things. And Judge Lindsay is very
11 good at that. She knows that. She was doing that long before
12 I was. So I think that's the go forward plan. Does that make
13 sense to you, Mr. Esposito?

14 MR. ESPOSITO: It does, Your Honor. I just want to
15 make sure (inaudible) and after the last conference that we're
16 all crystal clear. A lot of the things (inaudible), Judge
17 Lindsay has already ruled we're not --

18 THE COURT: Mr. Esposito, I'm sorry. I'm sorry.
19 I'm just losing you again. I don't know, can you move to a
20 different spot? I have a feeling you're not --

21 MR. ESPOSITO: Let me try.

22 THE COURT: -- well connected to the local tower.

23 MR. ESPOSITO: Yeah. Is this better?

24 THE COURT: Yeah. Much better. Thank you. Go
25 ahead.

1 MR. ESPOSITO: Okay. No, my apologies.

2 So the only thing I just want to make sure that
3 everyone's clear on is plaintiffs in the most recent exchanges
4 have renewed (inaudible) that Judge Lindsay (inaudible) upon.
5 And so what I'm hearing is the plaintiffs want to renew those,
6 we'll go back to (inaudible) and deal with those again.

7 But as far as running the search terms we said we
8 would run, (inaudible) custodians we said we'd run, producing
9 the documents in those three cases we said we would produce, I
10 hear you. We will produce them. And I understand the
11 plaintiffs will be turning over the factual information they
12 have from their plaintiffs. Is that fair?

13 THE COURT: I think that makes sense. Yeah.

14 Counsel for plaintiffs (inaudible) --

15 MR. NAPOLI: I just -- I think that's fine, but I
16 don't know what he means by renewed. We made demands. He
17 needs to respond to the demands. There were three categories
18 of documents he said he was withholding he would produce. And
19 we will send them an updated chart on our clients of any
20 additional information we have. I mean, that's my
21 understanding.

22 MR. ESPOSITO: Yes. We'll respond --

23 MR. NAPOLI: He's going to turn over everything I
24 asked for and I'm going to turn over everything he asked for
25 is the best way to sum it up in my opinion.

1 MR. ESPOSITO: Yeah. So, again, he says everything
2 he asked for. And, Your Honor, things that he's asked for
3 have already been ruled upon.

4 So here's what I think makes the most sense. We'll
5 give him a formal response to what he has served on us. We
6 will make clear it include that (inaudible) already agreed to
7 produce.

8 And if they have an issue with it, we say we'll go
9 back to Judge Lindsay and hopefully you don't have to be
10 bothered with this. But if you do, obviously (inaudible) --

11 THE COURT: Yeah. And I don't mean to suggest I'm
12 being bothered. It's just that, you know, I have a certain --
13 you know, I was struggling with the whole *Lone Pine* and how do
14 we do this and then I realized we already have the mechanism
15 to do this and we all know what that mechanism is, right,
16 which is the Rule 26 rules and the rules around those.

17 Get the documents turned over. I have the sense
18 that if everybody turns over everything we just talked about,
19 we have a very good start.

20 Now, everyone should recognize discovery is an
21 ongoing process and people may discover things, right -- it's
22 part of the word. There may be follow-ups and so forth and
23 you're going to have to work together to get through this.
24 That's the only way this is going to work. So make sure you
25 work together.

1 But I'm going to refer it back to Judge Lindsay for
2 incredible -- to bring her incredible expertise to any further
3 problems that you have.

4 We are going to set a September 1st date to begin
5 the class action discovery motion process. And I'll ask the
6 counsel to follow up whenever, at your convenience, file a
7 schedule, an agreed-upon schedule (indiscernible) exactly what
8 the (indiscernible) is going to come in. You all can work
9 that out, you know, to your (indiscernible) schedule.

10 I recognize the pandemic is slowing everything down,
11 that's why I'm giving you this much time. Because, you know,
12 the case has dragged for a while, but we're talking about
13 another, you know, nine to ten months here before you have to
14 get everything wrapped up.

15 But I think if you turn over the documents and
16 information we discussed today, I think you'd be well on your
17 way to starting. You'll have some depositions to conduct and
18 you have to do those by video. You may have to do them in
19 different ways, but, you know, you're all very, very qualified
20 counsel and I have faith that you'll resolve these things.
21 Yes?

22 MR. NAPOLI: Yes.

23 MR. ESPOSITO: Thank you, Your Honor.

24 MR. NAPOLI: Well, we appreciate that.

25 Judge, just so the record is clear too because I

1 don't want -- I know we -- everybody keeps talking about the
2 case has been pending for four years and I don't want to blame
3 the parties or the Court, but we have had -- the reason for
4 the delays have been -- the pandemic has certainly had a
5 little bit of a bite, but this case has transferred from
6 several judges over the years who have had some time, the case
7 stayed. So I don't want to (indiscernible) --

8 THE COURT: Counsel, I will reiterate -- I will
9 reiterate that I'm hoping that the bouncing from judge to
10 judge will end now, right. I'm hoping to stay with this for a
11 while.

12 MR. NAPOLI: Yes.

13 THE COURT: You know, I'm doing my best. I'm
14 wearing a mask. So I hear you. And I'm not walking out of
15 this.

16 I'm not casting any aspersions or any blame, but I
17 will say it's a very important case to everybody and there's a
18 lot of work to do, so let's get the stuff turned over and
19 let's start focusing on getting, you know, what we really need
20 to get.

21 You're both fine lawyers and, you know, you can't
22 help but sometimes wrap your arguments about the whole case
23 into every dispute that we have. Ah, Judge, it's just another
24 example, they're not turning over this. But let's just try to
25 move forward so we can all have what we need to resolve

1 things.

2 And to be clear so the record's clear, I'm not
3 imposing any sort of *Lone Pine* framework because I don't think
4 we need it because everything I read suggests to me this is
5 simply discovery disputes.

6 And using the proportionality standard that she
7 knows so well, Judge Lindsay is going to handle this just
8 fine. So I think she'll be terrific on that.

9 Let me say that once again I've entirely ignored
10 counsel from the Town and I apologize for that.

11 MR. SEIDEN: That's okay, Your Honor. I have
12 nothing to add to this. You've been great.

13 THE COURT: Okay. All right. Well, good. Just
14 keep doing what you're doing then.

15 MR. SEIDEN: You've been busy, Judge. I've been
16 reading about you.

17 THE COURT: Well, it's a good time for everyone to
18 stay busy. Let's put it that way, right.

19 MR. SEIDEN: (Indiscernible.)

20 THE COURT: (Indiscernible) keeping the courthouse
21 closed. We did one trial since I last spoke to you by Zoom,
22 the entire trial, and it was phenomenal. It was amazing.

23 MR. SEIDEN: I did read about that, Your Honor, yes.

24 THE COURT: So, you know, there are things we can do
25 and we're going to do what we can. And hopefully if any of

1 you have any biotech clients, those vaccines will come
2 quickly. That's all I can wish for. So, you know.

3 All right. Anything else we need to cover all
4 together today?

5 MR. SEIDEN: Just let me tell you, Your Honor, I
6 don't think the plaintiffs and I have -- I mean, anything that
7 we -- I mean, I've produced everything I have except for some
8 historical documents. I will produce those. I must say to
9 Mr. Napoli, that unfortunately those historical documents do
10 not -- given the time frame, they do not contain any data.

11 The Town didn't do any kind of environmental
12 assessment -- I can represent that -- when Grumman gave them
13 the land for the park. That would have been helpful. Who
14 knows if the Town would have taken the park had it done such,
15 but that's neither here nor there.

16 But I will get him those documents. I did produce a
17 privilege log. Anything we have a dispute about, we will try
18 to resolve. And what we can't resolve, I guess we'll bother
19 Judge Lindsay.

20 THE COURT: Okay. Sounds good.

21 Anything else anybody else has for today?

22 MR. NAPOLI: No, Your Honor. Just thank you very
23 much.

24 MR. SEIDEN: Thank you very much, Your Honor.

25 MR. ESPOSITO: No, Your Honor. Yeah.

1 THE COURT: Yeah. Hopefully we'll --

2 MR. ESPOSITO: Not from defendants either. Thank
3 you.

4 And happy holidays to everyone.

5 THE COURT: Yes. Same to you all.

6 MR. SEIDEN: Yes.

7 THE COURT: And let's hope we get to see each other
8 in the new year. That would be something.

9 MR. ESPOSITO: I know. That would be great.

10 MR. SEIDEN: Thank you.

11 THE COURT: All right. Be well. We'll talk to you
12 soon. All right. We're adjourned.

13 MR. NAPOLI: Thank you.

14 MR. SEIDEN: Thank you, Your Honor. Bye.

15 (Proceedings concluded at 10:52 a.m.)

16 I, CHRISTINE FIORE, court-approved transcriber and
17 certified electronic reporter and transcriber, certify that
18 the foregoing is a correct transcript from the official
19 electronic sound recording of the proceedings in the above-
20 entitled matter.

21
22 

23 _____ December 8, 2020

24 Christine Fiore, CERT

25 Transcriber